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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Policy and Rules Concerning the)
Interstate, Interexchange Marketplace)

CC Docket No. 96-61
Part II

Implementation of Section 254(g) of the)
Communications Act of 1934, as amended)

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COMMENTS OF GTE

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domestic telephone and interexchange
companies

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SUMMARY

GTE supports “permissive” detariffing, which offers important public interest benefits, but strongly opposes mandatory detariffing. While the 1996 Act confers on the Commission authority to forbear from enforcing “any” provision of the Communications Act, it does not grant authority to make detariffing mandatory. Thus, the FCC’s tentative decision to implement forbearance on a mandatory basis is beyond the scope of forbearance authority granted by the 1996 Act.

Even if the Commission may legally compel detariffing, GTE believes that permissive detariffing would be more “consistent with the public interest” as required by the 1996 Act. Permissive detariffing has given nondominant carriers maximum flexibility in determining how to offer their services without undue regulatory mandates.

GTE supports the tentative conclusion that carriers should be able to package products in order to meet specific customer needs. In a competitive market, the ability to offer packages of services is important and often provides consumers the benefit of “one-stop” shopping. Notwithstanding the ability to package interexchange services with CPE, carriers should be required to make the interexchange service component of the package available on an unbundled basis.

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COMMENTS OF GTE

GTE Service Corporation ("GTE"), on behalf of its affiliated domestic telephone and interexchange companies, submits the following comments regarding Sections III, VIII and IX of the *Notice of Proposed Rulemaking* ("Notice" or "NPRM") in the above-captioned proceeding, FCC 96-123, released March 25, 1996. In this *Notice*, the Commission seeks to implement a number of provisions of the Telecommunications Act of 1996 ("the 1996 Act").

I. INTRODUCTION

In Section III, the *Notice* considers whether to forbear from applying tariffing requirements to nondominant interexchange carriers ("IXCs"). The Commission tentatively concludes (at ¶19) that it is required to forbear from applying Section 203 tariff filing requirements to nondominant domestic, interstate, interexchange carriers. Section VIII considers the "bundling" of Customer Premises Equipment ("CPE") with

interstate, interexchange services. While the Commission tentatively concludes that both the interstate, interexchange market and the CPE market are sufficiently competitive to allow interstate, interexchange carriers to offer packages of services that combine CPE with interstate, interexchange services, it seeks comments on whether the components of packaged offerings should be available on a separate basis. Section IX evaluates contract tariff issues that will still be relevant if the Commission decides not to forbear from requiring the filing of tariffs.

II. THE COMMISSION SHOULD FORBEAR FROM TARIFF REGULATION THROUGH A POLICY OF PERMISSIVE DETARIFFING.

Section 10(a) of the 1996 Act states that the Commission “shall forbear from applying *any* regulation or *any provision* of this Act . . .” to affected telecommunications services or service providers if three specified conditions are met.¹ The *NPRM* proposes to apply Section 10(a) to the Section 203 tariff filing requirement for nondominant interstate IXC, and to adopt a “mandatory detariffing” policy that would prohibit nondominant carriers from filing tariffs.

GTE supports “permissive” detariffing, which offers important public interest benefits, but strongly opposes mandatory detariffing. GTE believes that mandatory detariffing is wrong both as a matter of law and policy.

¹ Section 401, adding §10(a), *to be codified at* 47 U.S.C §160 (emphasis added).

A. The Criteria for Forbearance are Met for Nondominant Interexchange Carriers.

GTE supports the Commission's tentative conclusion that forbearance from enforcement of Section 203 tariff filing requirements is justified in the current interstate, interexchange marketplace.² More specifically, GTE generally agrees that tariffs are unnecessary to ensure that nondominant IXCs' rates are just, reasonable and nondiscriminatory, or to protect consumers. Forbearance from tariff filing requirements is justified under the conditions set forth in the 1996 Act.³

First, in the competitive interexchange marketplace contemplated by the 1996 Act, competition and the ability of the consumer to select from numerous, competing long distance service providers should ensure that rates are just, reasonable and non-discriminatory. The Commission has recognized since the outset of the *Competitive Carrier* proceeding that, in a competitive marketplace, carriers will be unable to sustain rates above competitive levels. Therefore, tariff regulation is not "necessary," at least in most cases, to ensure that rates are just, reasonable and non-discriminatory.⁴

Second, although tariffs can be helpful with respect to mass marketing, tariffs are not necessary to protect consumers since nondominant IXCs lack the power to charge

² See *NPRM* at ¶28.

³ See 1996 Act §10(a)(1)-(3).

⁴ The Commission retains the ability to enforce carrier compliance with requirements of the Communications Act through the complaint process.

excessive rates. Indeed, GTE is not aware of any material increase in consumer complaints while the Commission's permissive detariffing policy was in effect.

Third, GTE agrees that permissive forbearance from enforcement of tariff filing requirements for nondominant interexchange carriers is in the public interest. Particularly where service agreements are the product of negotiations between sophisticated parties, experience has demonstrated that the option of not filing tariffs can foster competition.

Since the three conditions specified in the 1996 Act have been met, GTE agrees that the Commission may forbear from enforcing its tariff filing requirements. GTE does not believe, however, as discussed below, that such forbearance should be mandatory.

B. Section 10(a) Does Not Authorize the Commission to Prohibit Tariff Filings.

While the 1996 Act confers on the Commission authority to forbear from enforcing "any" provision of the Communications Act, it does not grant authority to make detariffing mandatory. Therefore, the FCC's tentative decision to implement forbearance on a mandatory basis is beyond the scope of forbearance authority granted by the 1996 Act.⁵

⁵ In 1985, the Court of Appeals invalidated the Commission's previous mandatory forbearance tariff policy as beyond the agency's statutory authority. *MCI Telecommunications v. Federal Communications Commission*, 765 F.2d 1186 (1985). Significantly, the court did not reach the issue whether permissive forbearance went beyond the scope of authority granted the Commission pursuant to the Communications Act. It was not until 1992 that permissive detariffing met the same fate. See *American Telephone and Telegraph*

The plain language of the 1996 Act supports the view that Congress did not intend to grant the FCC the power to make forbearance mandatory. As noted above, the 1996 Act states that “the Commission shall forbear from applying any regulation or any provision of this Act”⁶ As drafted, this provision represents a directive for the Commission, not regulated industry. The Act simply requires that the Commission forbear from mandating that nondominant IXCs file tariffs, or from sanctioning them if they choose not to file, under certain conditions. However, the 1996 Act makes no change in the general duty of carriers to file tariffs established by Section 203(a).⁷

Indeed, the fact that Congress did not amend Section 203(b), which gives the Commission power to “modify any requirement”⁸ of Section 203 suggests that the drafters did not intend to transform the Commission’s power “to modify” into the power “to eliminate.”⁹ The Supreme Court established in *MCI v. AT&T* that the term “modify”

Company v. Federal Communications Commission, 978 F.2d 727 (D.C. Cir. 1992), cert. den. sub nom. *MCI Telecommunications Corp. v. FCC*, ___ U.S. ___, 113 S.Ct. 3020 (1993), which the Supreme Court confirmed two years later. See *MCI Telecommunications v. American Telephone and Telegraph*, ___ U.S. ___, 114 S.Ct. 2223 (1994).

⁶ 47 U.S.C. §160.

⁷ “Every common carrier, except connecting carriers, *shall*, within such reasonable time as the Commission shall designate, file with the Commission . . .” tariffs. 47 U.S.C. §203(a)(emphasis added).

⁸ 47 U.S.C. §203(b)(2).

⁹ Common understandings of the term “forbear” also support the view that Congress was referring to permissive detariffing. Forbear is defined in the *American Heritage Dictionary* as “to refrain from” or “resist.” To refrain from or

in Section 203(b) does not mean “eliminate.” If Congress had wanted the Commission to go beyond permissive forbearance, it easily could have added “or eliminate” to Section 203(b), or clearly defined the term “forbear” in Section 10 as an equivalent to repeal.¹⁰ That it did not do so suggests that mandatory detariffing was not Congress’ intent.

The legislative history of the 1996 Act similarly offers no support for the Commission’s current proposal. Congress neither expressly discussed the scope of forbearance nor amended the tariff filing requirements of Section 203.

Finally, the Commission’s citation (at ¶35) to its adoption of a similar mandatory forbearance policy for domestic CMRS does not establish that it is required for nondominant IXC’s by the 1996 Act. Section 10(a) starts: “[n]otwithstanding section 332(c)(1)(A) of this Act.” Thus, the 1996 Act clearly distinguished the regulatory flexibility of Section 10(a) from Section 332(c), and the Commission is not required to treat the detariffing permitted under Section 10(a) in the same manner, nor would the treatment here affect the policy adopted pursuant to Section 332. The detariffing under consideration here is quite explicitly “notwithstanding” the CMRS policy.

resist “applying” a regulation or statutory provision upon industry differs from forbidding industry from voluntary compliance (*i.e.*, mandatory detariffing).

¹⁰ Section 11(b) of the 1996 Act shows that Congress understands the difference between “modify,” on one hand, and “repeal” or “eliminate,” on the other. Section 11(b) states: “The Commission shall *repeal* or *modify* any regulation it determines to be no longer necessary in the public interest.” (Emphasis supplied).

For these reasons, Section 10(a) of the 1996 Act does not give the Commission the legal authority to make detariffing mandatory.

C. Sound Public Policy Reasons Support Adoption of Permissive Detariffing as the Most Deregulatory Approach.

Even if the Commission may legally compel detariffing, permissive detariffing would be more “consistent with the public interest” as required by Section 10(a). The *NPRM* (at ¶¶21-25) fails to acknowledge adequately the benefits of permissive forbearance.

GTE believes that permissive detariffing is more consistent with the deregulatory intent of the 1996 Act. Nondominant IXC's should have the freedom to offer their services in a manner most conducive to their customers' needs and business objectives. Permissive detariffing has given nondominant carriers maximum flexibility in determining how to offer their services without undue regulatory mandates.

By minimizing transactions costs, tariffs can offer benefits in a rapidly changing competitive marketplace, especially in the mass market. In the absence of a tariff, a nondominant IXC could incur potentially enormous transaction costs in contracting individually with end user subscribers. While these transaction costs could be potentially significant for all nondominant IXC's, they are especially burdensome for new entrants. Even if service contracts are not individually negotiated, the very process of contracting individually with customers would increase the cost of doing business in the mass market.

Tariffs can provide protection for consumers by establishing rights and enforceable obligations. For example, tariffs often establish specific rights governing matters such as credits for service outages, as well as defining reciprocal obligations. Tariffs can thus provide a convenient reference for understanding the terms of the business relationship. While the price of interexchange services is obviously important, consumers and carriers benefit from other standard tariff terms.

These benefits clearly outweigh any speculative concerns that tariffs constrain competition in the mass market by sending price signals. Furthermore, the current abbreviated one-day notice periods applicable to nondominant carriers, which were established after the courts voided the detariffing policy, greatly reduce the opportunity for price signaling now compared to the time of the *Sixth Report and Order*. Finally, the entry of new competitors as envisioned by the 1996 Act will further reduce the likelihood of collusive pricing. The Commission should not foreclose, by mandating forbearance, a potentially useful business practice for firms entering the market.

D. There is No Need to Modify the Fundamental Principles Applicable to Tariff Changes.

A permissive detariffing policy would require the Commission to address the tariff-related issues presented in Section IX of the *NPRM*, particularly as they pertain to contract tariffs.¹¹ GTE recommends that the Commission generally retain its policies

¹¹ *NPRM* at ¶92. GTE agrees that these tariff-related issues would be mooted if the Commission adopts mandatory detariffing.

regarding tariff changes. In addition, GTE agrees with the *NPRM*'s tentative conclusions that AT&T should be held to its commitments, made only last year, regarding its contract tariffs.

GTE is a party to negotiated contracts regarding telecommunications facilities in the capacity of a lessor (particularly for its local telephone operations) and as a lessee (through its interLATA entity, which provides service as a reseller). As such, GTE approaches the issues discussed in Section IX from the perspective of both a carrier/provider and a customer/reseller. Based on its experience, GTE believes that little change is required in the filed rate doctrine.

As the *NPRM* states, the law regarding the reasonableness of tariff changes to negotiated service arrangements is well-established,¹² and there is no need to revise it at this time. Only last year the Commission concluded that commercial contract law, while "highly relevant" in the case of negotiated contracts, should not be the sole and dispositive basis for a substantial cause showing.¹³ GTE believes that this should continue to be the law. The very existence of an extensive regulatory regime

¹² See *RCA American Communications Inc., Revisions to Tariff F.C.C. Nos. 1 and 2*, 84 F.C.C. 2d 353, 363 (1980); *RCA American Communications, Inc., Revisions to Tariff F.C.C. Nos. 1 and 2*, 2 FCC Rcd 2363 (1987) (changes to long-term service contract are reasonable only where carrier shows "substantial cause" for change); *Bell Tele. Co. of Penna. v. FCC*, 503 F.2d 1250 (3d Cir. 1974), *cert. den.*, 422 U.S. 1026, *reh'g den.*, 423 U.S. 886 (1975) (applying *Mobile-Sierra* doctrine to tariffed inter-carrier contracts and establishing strict "public interest" test).

¹³ *Competition in the Interstate Interexchange Marketplace*, 10 FCC Rcd 4562, 4574 (1995).

established by the Communications Act suggests that more than merely standard commercial contract law should govern tariffs, whether the contract is between a carrier and a subscriber or between two carriers.

The *NPRM* (at ¶98) describes certain temporary commitments made by AT&T regarding its contract tariffs in its nondominance proceeding.¹⁴ These include giving all customers advance notice of filings of material changes, obtaining consent of all customers, treating objections as *prima facie* evidence of unlawfulness, and waiving termination liabilities upon material changes. GTE agrees with the tentative conclusion of the *NPRM* that AT&T should live up to its commitment. The more extensive commitments made by AT&T, while appropriate for a carrier with its imposing share of the interexchange market, however, are not needed for other nondominant carriers.

III. PACKAGING OF CPE WITH INTERSTATE, INTEREXCHANGE SERVICES SHOULD BE ALLOWED AS LONG AS THE COMPONENTS ARE STILL AVAILABLE SEPARATELY.

GTE strongly supports the Commission's tentative conclusion (at ¶88) that carriers should be able to package products in order to meet specific customer needs. In a competitive market, the ability to offer packages of services is important and often provides consumers the benefit of "one-stop" shopping. Therefore, GTE encourages the Commission to amend Section 64.702(e) to allow the packaging of CPE with interstate, interexchange services.

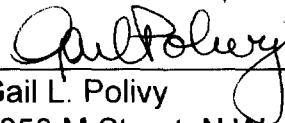
¹⁴ See *Motion of AT&T to be Reclassified as a Non-Dominant Carrier*, FCC 95-427 at ¶¶116-28 (Oct. 23, 1995).

Notwithstanding the ability to package interexchange services with CPE, carriers should be required to make the interexchange service component of the package available on an unbundled basis. This gives consumers the ability to determine whether to purchase the bundled service or create their own packages. Further, by requiring that the interexchange service component be available separately, the Commission would encourage competition in the CPE market.

Although the *NPRM* (at ¶88) addresses the ability to package services for nondominant carriers, GTE believes that these type of packaged offerings would be in the public interest whether offered by nondominant or dominant carriers. Having determined that the "CPE market is now widely recognized to be fully competitive,"¹⁵ the Commission should not prevent any carrier from offering packaged deals, especially if the communications service can be purchased separately.

Respectfully submitted,

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